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IN THE

Supreme Court of the United States

October Term, 1963

No. 167

SIDNEY J. UNGAR,

Petitioner,

—against—

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York,

Respondent.

PETITIONER'S PETITION FOR RE-HEARING

Petitioner, an attorney-at-law in good standing in the State of New York, does hereby submit, pro se, the accompanying Petition For a Re-Hearing.

Respectfully submitted,

SIDNEY J. UNGAR
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32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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Petitioner, on the following grounds, petitions this Court for re-hearing:

It is a difficult and unhappy task to take issue with, and claim that major factual findings and statements contained in the Court's majority opinion are basically inaccurate, but since the Court's concept of petitioner's and respondent's conduct during the trial forms the gravamen, very heart and basis of its decision, petitioner must call the real facts thereof to the Court's attention in the hope that, placed in proper perspective, they may cause the Court to reconsider its opinion.

The record submitted to the Supreme Court contains but a fraction of appellant's testimony in the second trial. The only testimony in the transcript before the Court is that set forth in Exhibits 2, 3, 4 and 7 of the petition to the Appellate Division and the excerpts contained in the Judge's contempt citation. Counsel did not print the ba-

lance of the record, in the belief that it was not necessary or relevant for decision of the constitutional questions before the Court. His position was that only the incident of alleged contempt on November 25th was charged and before this Court for determination. On the issue of embroilment between the petitioner and respondent, counsel felt that said incident alone disqualified the respondent from sitting as the Judge in the contempt hearing.

Had appellant known that the Court would consider background to determine whether there was embroilment, hostility or bias, the full record would have been submitted.

It is respectfully contended that if such record were fully examined the Court would not take the position that petitioner "from the outset of the second trial * * * was a hostile witness engaged in much wrangling * * * unresponsive * * * failed to heed instructions * * * , continued the pattern after being warned in chambers * * *, and failed to give a responsive answer to a question of apparent significance to the State."

It is further respectfully submitted that a reading of the full testimony could not possibly lead to the factual conclusions drawn in the opinion that

(1) petitioner claimed he was being badgered and that the Court was "suppressing evidence" because he was being required to answer questions asked, rather than others which he would rather answer, and that

(2) "whatever disagreement there was between petitioner and the Judge stemmed from the petitioner's resistance to the authority of the Judge and its exercise during the trial."

The inference from these statements in the majority opinion is that petitioner was continually creating problems, whether intentionally or not, for the Judge, who was forebearing and patient, and the Judge was forced into the position of holding petitioner in contempt.

Although petitioner has been advised that the question of whether he was actually guilty of contempt was not before the Court; it is the key issue to petitioner. Furthermore, petitioner believes that it was an important element in this Court's consideration of the case and its opinion. Petitioner is not interested in narrow legal concepts. However, aside from the absent testimony of the first and second trials, there are a number of incontrovertible facts not before the Court that establish that these conclusions and inferences are inaccurate and that the Court is under a serious misapprehension and misconception of the facts.

1. The Civil Liberties Union, after a study of the full record, in its brief to the Court of Appeals, had the following to say about the respondent's conduct: "The record of the trial contains ample evidence of respondent's hostility to petitioner and of his personal embroilment with him. • • •. Respondent • • • allowed his disagreeable experience with petitioner at the first trial to color his attitude toward petitioner at the new trial • • •. It is evidence of the climate of hostility against petitioner *created by respondent* that respondent made a classical "Freudian" mistake in calling petitioner a "defendant" and that the prosecuting attorney arrogated to himself the prerogative of the judge to make rulings. • • • " The record in the instant case contains substantial evidence of the respondent's animosity to petitioner and his personal involvement • • • "

2. A convincing example of respondent's hostility, misconduct, bias, impatience and attitude toward petitioner is found in the action he took with respect to the motion made by the petitioner, before petitioner even became a witness at the second trial, which motion is set forth on pages 124-130 of the record of this Court.

Petitioner, acting as his own attorney, made a formal motion before the Court on notice to all parties, returnable on November 18, four days before he was called to testify, in which motion he asked the Court to be made a Court's witness, and be given protection against improper, unfair and irrelevant questioning by either the District Attorney or defendant's counsel to which he had been ruthlessly subjected in the first trial, and he further asked the Court for leave to give the court privately the full facts not developed in the first trial.

The Judge would not hear the motion on the return date, the 18th. The record shows that on the 22nd, the prosecutor called petitioner as a witness and the following occurred before petitioner was sworn:

The Judge called a conference at the bench of counsel and then stated:

> "Please stand near, Mr. Ungar so that you can hear this."
>
> • • • • •
>
> "On November 17th, the witness did bring some papers here into Court and had them delivered to me. These papers are on legal cap and on the back it states 'Notice of Motion, affidavits and exhibits' • • •.
>
> In my opinion, these papers do not constitute any proper motion and I do not so recognize them • • • In my judgment there is no merit whatsoever to these

papers of legal cap, and I am not treating them as a motion. However I am treating them as requests addressed to the Court in camera * * * and they are all denied.

"Ungar—May I ask a question, your Honor?

"The Court: No, you may not. So that there will be no possible misunderstanding of the Court's ruling when I said I shall deem these papers as a request addressed to the discretion of the Court in camera, I also meant to say in no uncertain terms that these papers shall not be a public record * * *."

Petitioner does not question the Judge's power to deny the motion. However, does this Court know of any legal procedure whereby a court can say that a duly made motion is not a motion; that it will not allow the moving party to say anything; that it will consider the application as a secret and that it will suppress its contents? Yet respondent did all of these incredible things. Are they not evidence not only of abuse of power, but hostility and bias?

3. Respondent's strange conduct may be more referable to hostility and bias when important background facts dealing with the relationship and interest of all the parties, some antedating even the first trial, are examined. A deep-rooted and ineradicable general prejudice of the Judge then appears.

(a) The record of the first trial shows colloquy between both counsel and the Judge seeking to lay the basis for a contempt finding against petitioner in said trial. Because of the wide publicity given to the case, there were political considerations that dictated punishment of petitioner as well.

(b) In the first trial petitioner's testimony covered almost 900 pages and took more than six days. This, without access to his ten days of Grand Jury testimony. The jury disagreement occurred despite defense counsel's peculiar strategy *of making petitioner appear to be the actual defendant on trial rather than establishing the facts of his own client's innocence.* Petitioner apparently had been able to testify to sufficient of the material facts to create a doubt in the minds of almost 50% of the jury and respondent blamed appellant for this jury disagreement.

(c) Before the second trial petitioner asked for permission to refresh his memory by an examination of his former testimony. This was denied him. The prosecutor however, called petitioner and offered to "prepare" him. Petitioner refused to make a deal to convict a man whom he believed to be innocent of any wrongdoing and notified the Court thereof. (Pg. 100)* This was the reason for and background of petitioner's motion above stated.

(d) The District Attorney again reassigned Respondent, his former colleague of 17 years in the prosecutor's office in N. Y. County to preside at the second trial, and petitioner believes this not only to be improper, but as definite indication of recognition of respondent's attitude. Both the defendant and petitioner were therefore in a "locked" courtroom. The District Attorney and respondent between them as the record shows, circumscribed petitioner's testimony in the second trial to less than half of the first trial. Every item of the alleged "wrangling" or "unresponsive attitude" mentioned in the Court's majority opinion based on its reference to Note 2, resulted from questions which took parts of conversations out of context and attempted

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* Page references are to transcript of Record.

to distort them for the Jury as the analysis thereof, hereafter stated, shows. The District Attorney and respondent sought a conviction and regarded the whole truth as an obstacle thereto, and petitioner therefore became an object of their anger and hostility.

(e) Petitioner believes that the full record clearly shows that the respondent was not a judge but an assistant to the District Attorney, intent on again being a prosecutor helping to convict not only the defendant but petitioner who had been named as a co-conspirator in the indictment. Petitioner was, therefore, himself on trial but without any rights (Pg. 92).

It is an open secret in New York that respondent is regularly assigned by the District Attorney to try all "sensitive" cases. It is respectfully submitted that the reason why only one Judge is capable of presiding over the important "public" trials, is obvious from his conduct of this case.

Appellant, a practitioner for 24 years, was quite conscious both of the limitations of his rights as a witness, despite his being "on trial", and the attitude of hostility of the Court toward him from the first trial during which a number of serious clashes occurred.

The affidavit in support of petitioner's motion referred to above, denied by respondent "in camera" specifically refers (pg. 128) to petitioner's differences with respondent during the first trial which petitioner hoped to avoid in the new trial by said motion and hoped also thereby to prevent a contempt situation. Contempt was the last thing petitioner wanted.

Respect for the Judicial process is as much a part of appellant's personality as his physical being, but petitioner cannot believe that the obligation and duty to obey the authority and rulings of a court require that, as a free citizen, he must stand by and permit himself to be brain-washed and repeatedly threatened without justification, and treated as if he were being interrogated in a Spanish Inquisition or Nazi torture chamber rather than in an open American courtroom.

From the opening colloquy above quoted, petitioner felt, and he believes the full record shows that every act by respondent toward him was designed to throw fear and terror into petitioner's heart and mind so that he should be concerned with the possibility of contempt (planned at the first trial), or possible perjury (exhibits 2, 3, 4 on pg. 46 and 52, are some examples). He never felt as a free and voluntary witness. Petitioner was from the very beginning placed in the conflicting emotional state between his desire to tell the truth on the one hand, and his desire to avoid being held in contempt or charged with perjury, on the other.

Thomas Jefferson said "I will resist any form of tyranny over the mind of man". Judicial tyranny can be one of the worst forms and it is respectfully submitted that this Court has repeatedly recognized the obligation to strike out against abuse of power, no matter where it occurs.

It is petitioner's basic and factual claimed position.

1. That the Judge was a tyrant and an assistant District Attorney, conducting a locked courtroom and that petitioner was the special object of the respondent's tyranny.

2. That petitioner was deliberately provoked repeatedly in an effort to create a contempt situation.

3. That the so-called contempt hearing, far from being an orderly or decorous proceeding was a sham and circus performance put on by the Court for the benefit of the press, radio and television who occupied the jury box; that the Judge not only had already convicted petitioner and had his speech written out, but petitioner knew the sentence in advance. The spectator referred to by Mr. Justice Black in his questioning on argument was a reporter going to file his story Other items on this "hearing" will be reserved.

4. That the charges petitioner made against the Judge are true and the "apology", so designated by the Respondent and incorrectly referred to by petitioner's counsel on argument, was merely a statement to the effect that petitioner never intended or wanted to make the charges, but because of irresistible pressures created by the Judge, he involuntarily blurted out his inner convictions. Once made, petitioner in good conscience could not withdraw them.

If the entire record is examined in the perspective of these allegations and charges, it is respectfully hoped that the Court will reconsider its conclusions and opinion.

Even if the Court should read the record and not agree with petitioner's judgment, petitioner, at least, should have some forum in which these charges can be tried. Every effort to have them heard in New York has met with official silence or rejection. By this Court's affirmance of the contempt conviction the door seems to be closed on the opportunity to find out if the charges are true. On

the argument in this Court the question was asked, "what more could counsel on an adjournment have accomplished?" Could not a trial before another Court determine if petitioner's charges were true? By determining that a judge can hold a contempt proceeding before himself at any time, the Court will effectively prevent adjudication before an impartial tribunal of charges involving said judge. A person so charged would also invite a fresh contempt sentence if he were to repeat the charges.

There is even a broader principle involved. Participants in a trial will be barred from criticizing judges who may be guilty of wrongdoing, because the Judge can pose, as in this case, as an aggrieved party, and punish the accuser for contempt at anytime and there will be no remedy. Yet that is the effect of the Court's opinion. Petitioner feels that it was error for this Court to analyze the evidence, particularly when based only on respondent's restricted contempt citation, and make findings of fact in favor of the respondent without a full hearing before an impartial judge in which all the facts could be developed.

This Court recently established a new principle that it is not libelous for a newspaper to criticize any public official in the absence of deliberate malice. Why should not the same rule and standard, with limitations, of course, but thus insuring responsible conduct, be required of Judges? Petitioner appreciates the danger of abuse and a possible threat to the judicial process, but it is respectfully submitted that our democracy and judicial procedures may be strengthened if some members of the Judiciary knew that in the operation of their courtrooms they could not place themselves above the law. Petitioner recognizes and understandingly accepts the necessity for judi-

cial authority. He could not have actively practiced law for over a score of years without living by these principles. He also understands that instances do occur when a party, attorney or witness, may seek to intentionally provoke or otherwise tax the patience of a Court, but in the absence of a situation which clearly establishes that said conduct would cause "dissolution of a trial or demoralization of the Court's authority before the public", which certainly did not occur here, blind obedience to or acceptance of intolerable conduct by a judge without the right to criticize or challenge same will do violence to justice and freedom.

In negation of this Court's factual findings and observations, hereinabove referred to, petitioner briefly desires to analyze the excerpts quoted in Note 2, along with their surrounding facts, and further wishes to briefly refer to the circumstances of the "warning in Chambers" and the final incident of November 25th.

Firstly, petitioner did no have difficulties with the District Attorney from the outset of his testimony in the second trial, nor was he hostile. He testified for over an hour consuming over 40 pages of the trial record and answered all questions without incident.

The first excerpt from the contempt citation quoted in Note 2, which occurred thereafter, refers to the subject matter of conversations with Gale and Cymrot. Petitioner offered to give the conversations. The District Attorney, however, commenced a practice of asking a two part question, which assumed facts which were not true and which therefore could not be answered "yes" or "no", but part of which was "yes" and part "no". That this was so, was established by the Court's own questions (Page 3, Note 2)

which shows that petitioner spoke to these men, but not about the terms of the lease.

2. In the second quoted incident, the same thing occurred. The question asked by the District Attorney again was a two part question that assumed that petitioner had a conversation with defendant about the proposed lease. The record shows no such conversation ever took place. Petitioner's subsequent testimony showed that petitioner might probably have casually mentioned to Mr. Jack, in one of his innumerable conversations with him, that he was buying a property in which the City was a lessee, without any comment from defendant. Yet the "loaded" question, as asked, sought to create an impression that there was a conversation with defendant about the *lease*. It therefore could not be directly answered.

3. The next excerpt was part of the same subject matter. The District Attorney again sought to create the impression that petitioner had discussed this matter with Jack a half dozen times, rather than the fact that he had told the prosecutor about the said probable casual conversation a half dozen times. This was again the two part "loaded" question.

4. After the Court again berated petitioner for offering to explain figures which seemed to be confusing the District Attorney, petitioner was asked, two pages later by the prosecutor "Well, what happened to the $150,000. You tell us in your own words". These were the very figures that the Court had just lectured petitioner about. However, again the Court's citation studiously ended the specification without showing the full picture, thus creating the aura of "volunteering or wrangling" referred to in the majority opinion of this Court.

It is respectfully submitted therefore, that the excerpts referred to in the Note 2 do not establish that petitioner attempted to rephrase questions or create problems. It is also most important to note that the respondent's citation studiously avoided inclusion therein, of three occasions when the judge without any basis and as part of his terror campaign and impatience warned petitioner he was contemptuous. Obviously, setting forth totally unwarranted threats of contempt would only prove respondent's hostility and attempts to badger petitioner.

Realizing that the contempt threat was present at all times petitioner leaned over backwards to comply with the instructions of the Court.

The background of the admonishment in Chambers is even more amazing.

A long double entendre statement involving not the defendant, but petitioner's alleged motive in making the loan to defendant was followed by the question "was it true"? Petitioner asked "was what true" trying to ascertain whether it was true that such statement was made to the grand jury by petitioner or whether the substance of the statement was true.

Petitioner's question to the District Attorney is printed incorrectly in this Court's record as "was *that true?*" (pg. 83). Immediately the Court jumped in said "no" • • • my dear man" excused the jury, ordered petitioner into the robing room, opened the Judiciary Law and began reading the statement appearing in note 7 on page 11 of this Court's opinion. It was so apparent to petitioner by that time that the campaign of terror was going to be the rule, that peti-

tioner asked respondent to cite him for contempt right then, but petitioner was abruptly dismissed (note 7).

Nor was there any special pattern of conduct by petitioner thereafter. A reading of the full record must satisfy this Court that respondent far from being patient and forebearing with petitioner, even conceding petitioner might have been a difficult witness, was irrascible, threatening, harrassing, badgering, a hostile and biased judge and an assistant District Attorney on the bench.

Petitioner did not want to quarrel with or criticize respondent's rulings. He merely wanted to get through with his testimony and get out of the courtroom. He even consulted a doctor and a lawyer on Thanksgiving Day, the 24th, the day before the main incident occurred on the 25th, on how to accomplish this, because he felt it was respondent's intention to create an incident, if possible, to use as the basis of action against petitioner, which respondent finally did.

This was the background of the incident of the 25th. The immediate questions asked leading to the incident, far from being vital to the State's cause were fully and correctly answered before the alleged contempt outburst, but the Judge and prosecutor did not want the answers. The prosecutor knew from petitioner's testimony on the first trial which he had before him, as well as petitioner's grand jury testimony, that the questions asked had no answers other than that which he already had. They were deliberately "loaded" and misleading questions, because the prosecutor knew that the full conversation would not be helpful to the false picture he was seeking to create.

The record shows that two basic questions were involved. Taking a phrase out of a statement petitioner had made to

the defendant, the prosecutor asked (1) "Did you tell Jack there was a full scale Grand Jury investigation"? A. "I did". (2) Then the impossible question * * * "when you told Mr. Jack there was now a full scale Grand Jury investigation, what did Mr. Jack tell you."? A. "He didn't respond to just one simple statement. It was part of a conversation and I can't distinguish one sentence from another in a half hour conversation the full details of which I don't recollect."

This was in essence what was said in the first trial and in the Grand Jury, as an examination of their records will reveal. Defendant had never made any comment about the Grand Jury investigation and the prosecutor knew it. Were not the answers full, responsive, direct, proper and honest answers? Should not the answers have sufficed? However, the Court jumped in immediately with, "Strike that all out."

The Court and the District Attorney were not content with the factual answer. The District Attorney wanted petitioner to give a false answer, and create the impression that the conversation was evil or conspiratorial by taking a phrase out of context from a statement petitioner had made to defendant, and seeking to get an answer that did *not exist*. The Court joined him as his assistant, intent on again being a prosecutor, and the explosion finally occurred.

The incident is clear proof and evidence that the charges of badgering and suppression were true. Respondent kept demanding an answer that did not exist, struck out a correct answer, and would not let the full conversation be testified to.

This was when petitioner's nerves began to give way and he repeatedly begged for a recess to contain himself.

Can this Court understand what it is like to feel chained to a chair? Petitioner felt as if his heart would explode inside of him and fought for control until the dam broke. Petitioner became violently ill and respondent knew it, which was why he refused to call a doctor although he twice consulted the District Attorney's staff as to what to do.

That scene was a defilement of everything American Justice stands for. Even if this Court may not believe all of these allegations or doubts petitioner's ability to prove them, should not he be permitted the opportunity to try to prove them. Would not the cause of Justice be better served by finding out what the truth is? Is not the cause of Justice injured by closing the door to an inquiry?

Appellant did not take this appeal seeking a technical legal victory. Petitioner's main motivation is a belief that fundamentals affecting the proper administration of justice and the freedom and liberty of the individual citizen are involved.

As to that sham contempt hearing, that was a planned travesty and mockery of justice. Why did respondent go through the show of serving papers, and then not giving a fair and full hearing, if he was objective? What harm would there have been to send the proceeding to another Judge if he had nothing to hide? What kind of a trial could petitioner have had before this judge on the face of this record? The Court's "evidence" on the hearing were the *whole* minutes of the first and second trial and some private letters. What parts thereof was petitioner to answer or defend himself against? How could he prepare for said

trial? Wasn't petitioner entitled to counsel of his own choice? How could he examine the Judge as a witness? How was due process served by the peremptory fashion in which petitioner was sent to jail without a stay or even one hour to produce the medical testimony? The proceeding was all part of the show for the press in the jury box. In the light of petitioner's charges, that proceeding disgraces judicial process. It is petitioner's hope that this feature of the case will also be explored and considered by the Court.

The denial of the application for an adjournment to both counsel and petitioner on the "hearing" was merely the final example of of respondent's mental attitude toward petitioner. It is in the same vein, as his action on the motion, his contempt warning in Chambers, his impatience, his badgering and threatening, his not only calling petitioner a defendant but his treatment of petitioner worse than any defendant should ever be treated in a Court, his charge that petitioner was a malingerer, his deliberately misleading contempt citation and the sham hearing. His conduct was merciless, brutal, obsessive.

Petitioner respectfully requests the opportunity to personally appear and plead his cause, if the Court should consider a re-hearing. Petitioner would like the Court to form its own opinion and judgment of petitioner's personality and attitude toward Courts by a thorough and complete examination of him. Petitioner believes the Court will be satisfied that he does not indiscriminately challenge the authority of judges.

It is difficult for the Court to understand the depths of petitioner's feeling of outrage over the terrible injustice he sustained in being incarcerated by the Judge for the

Judge's own misconduct and never having been given an opportunity to prove his charges. Now, in addition, he may have to face disciplinary proceedings thereon.

It is respectfully submitted that to permit this judgment to stand, may satisfy judicial self preservation, but it sets back the cause of responsible conduct by Courts, is a severe blow to individual freedom, and gives some judges greater license to exercise judicial tyranny.

In *Hamilton* v. *Alabama*, 793, decided March 31, 1964, the Supreme Court decided that Miss Hamilton, a witness at a trial could not be held in contempt of court because during the course of the trial she took exception to her treatment by the District Attorney in not referring to her by her proper name. Although the case had racial overtones, nevertheless, it is a recognition by the Court that a witness had a right to talk up as to the manner in which she was treated.

A final note on two legal points.

(a) The Supreme Court decision in the main rested on the question whether or not there was embroilment between petitioner and the Judge. In the brief and on the oral argument it was contended, irrespective of embroilment, a Court should not sit in a contempt proceeding involving it after a trial is over.

(b) The Supreme Court did not treat the proceeding on the contempt that was charged and found in the record, but instead accumulated the alleged other incidents and treated them as if they were part of the contempt. In other words, if the utterance of November 25th was not being considered as the sole basis for contempt, the injection of the other incidents for the first time in the opinion, deprived petitioner of an opportunity to meet the issues in the appeal itself.

The conclusion of this Court that the respondent could rule on the question of contempt in an objective manner is based on an incomplete and insufficiently revealing portion of the record. Examination of the whole record, or at least the portions thereof mentioned in this application, would clearly indicate to the contrary. The failure to bring up for review such other parts of the record was inadvertent and due to unforeseeability of the rationale of the Court's decision. The Court was placed under a misapprehension by such omissions. A reconsideration by the Court with the supplemental record will in all probability lead to the conclusion that the respondent was himself so emotionally involved in the matter as to be incapable of unprejudicial and objective rulings. Such a conclusion would require rehearing below in accordance with applicable requirements of due process.

CONCLUSION

Therefore, it is respectfully submitted that a rehearing should be granted to consider all of the facts hereinabove stated.

Respectfully submitted,

SIDNEY J. UNGAR
Petitioner, pro se
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Certification

The foregoing Petition For a Re-Hearing is believed to be meritorious and is presented in good faith and not for delay.

Dated: April 14th, 1964.

SIDNEY J. UNGAR
Petitioner, pro se
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